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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1964

VICTOR LINKLETTER,

Petitioner,

v.

VICTOR G. WALKER, Warden, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

May it please the Court:

The only issue before this Court is whether the decision of *Mapp v. Ohio*, 367 U.S. 643, should be given retroactive application to a State court conviction which became final prior to the *Mapp* decision or does the *Mapp* decision only have prospective application, i.e., those cases which are on appeal at the time of the *Mapp* decision on June 19, 1961.

SUMMARY OF ARGUMENT

The *Mapp* decision is to be only given prospective

application as this Court had decided that the exclusionary rule set forth in *Weeks v. U.S.* 232 U.S. 383, was not applicable to the States in State Court proceedings in the case of *Wolf v. Colorado*, 338 U.S. 25. In cases where this Court has recognized a rule which is of constitutional origin but has raised a procedural bar which denies the urging of the right in a criminal proceeding and the bar is later removed by this Court, the effect of the change should be interpreted under the more modern view as enunciated by Mr. Justice Cardozo and the legal realists, in that judges exercise a law-creating function, although, of course subject to the limitations of unreasonable "judicial legislation." (See 71 Yale L. J. 907, 911 (1962)) and reject the Blackstonian view that a court does not pronounce a new law but maintains and expounds the old and that when a decision has been overturned, the first one was merely evidence of the law, which had turned out to be erroneous.

ARGUMENT

This Court in the *Mapp* case did not give a clear indication as to whether the exclusionary rule enunciated therein should be given either a prospective or retrospective application. There have been six occasions in which this issue has been directly presented to six different U. S. Circuit Courts of Appeal, and four Circuit Courts have held that in State court convictions which have become final prior to the *Mapp* decision the exclusionary rule would be applied prospectively and that the remaining two held that it would be given retroactive application.

The Fifth Circuit Court of Appeal, in the case now before the Bar, rejected the traditional Blackstonian view that the Court merely finds the law which always has been there, and that prior overturned decisions were merely evidence of the law, but applied the more modern view which had been enunciated by Mr. Justice Cardozo and the legal realists.

It is suggested, upon examination of the *Wolf v. Colorado* case, supra, that this Court recognized that the *Weeks* rule, which is that evidence illegally obtained may not be used against a defendant, was of constitutional origin and the Court decided that the exclusionary rule would not be imposed upon the States as "an essential ingredient of the right." (338 U.S. at Page 27-29).

The Court in *Mapp* added the exclusionary rule to the right of privacy which had been recognized in *Wolf* for the specific purpose of enforcing the right of privacy embodied in the Fourth Amendment, as the Court felt that to allow the invasion of privacy by State officers would be to permit that right to remain an empty promise.

The sole purpose enunciated above creates a deterrent against State officers in conducting illegal searches, that being the sole purpose of the Mapp decision.

This Court recognized that the exclusionary rule was separated from the basic right to privacy in the *Mapp* case which is set forth as follows:

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

> Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States*, supra, at 217." 367 U.S. at 656, 81 S. Ct. at 1692, 6 L.Ed. 2d 1081.

The writers have recognized that the purpose of the exclusionary rule is that of a deterrence. See Traynor, "*Mapp v. Ohio* at Large in the Fifty States" 1962 Duke L. J. 319, 320, 341, 71 Yale L. J. 907, 942 (1962).

The rule was not imposed because of the inherent unreliability of the evidence illegally seized but only as a deterrence and such being the case, this Court, in determining whether the *Mapp* case should be given retroactive or prospective application, should ask if the deterrent effect would be fostered if every State conviction which was based upon illegally obtained evidence was overturned. It is the respondents' contention that it would not. It is enough that the State officer know that if they now commit an unlawful search and seizure the evidence so secured will be excluded under the ruling of the *Mapp* case.

Petitioner contends that this Court has applied the exclusionary rule of *Mapp* retroactively to three cases, *Ker v. California* 374 U.S. 231, *Fahy v. Connecticut* 375 U.S. 85 and *Stoner v. California* 376 U.S. 483. An examination of these cases reveal that none of them were final judgments prior to the *Mapp* decision. It is submitted that the Court was applying the law of the land at the time of or before final judgment as was

stated by Chief Justice Marshall in *United States v. Schooner Peggy* 5 U.S. 102 (1801).

The Court could also have relied upon the principle that either or all of these cases could have been presented to the Court in the same manner as the *Mapp* case and that each would have been decided as *Mapp* was. Therefore, the application of the exclusionary rule in these cases are no guide post by which it can be said that the rule of *Mapp* is to be applied retroactively.

The petitioner further likens the application of the case of *Griffin v. Illinois*, 351 U. S. 12, in *Eskridge v. Washington*, 357 U.S. 214 to the rule of the *Mapp* case. The Griffin case held that an indigent defendant was entitled to a free transcript in order that he may perfect an appeal. The *Griffin* case was held to apply retroactively in the *Eskridge* case. The rule of the *Griffin* case, as stated by the Fifth Circuit Court of Appeal, provides a fairness of procedure. Further, the Griffin rule would possibly prevent the innocent from conviction.

Petitioner also analogies the rule of the case of *Gideon v. Wainwright* 372 U.S. 335 (1963) which gives the Sixth Amendment's guaranty of right to counsel to State defendants. The Gideon rule is one of those constitutional guaranties which go to the very essence of fair trial. It has not been limited to a deterrent purpose as Mapp. (See *Sisk v. Lane* 331 F.2d 235 (1963).

Neither the *Griffin* case, supra, nor the *Gideon*

case, supra, overruled a previous decision. The States should be able to rely upon the law of the land as expounded by this Court until such time as the Court overrules its previous decision. The *Mapp* case is one that is indeed unusual.

CONCLUSION

The rule of the *Mapp* case should be restricted to prospective application only, and that the judgment of the Fifth Circuit Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served a copy of the foregoing brief on Truman Hobbs and Euel A. Screws, Jr., attorneys of record for Victor Linkletter, by mailing such copy, postage prepaid, to them at their address at 444 South Perry Street, Post Office Box 347, Montgomery, Alabama.

Baton Rouge, Louisiana, this____day of September, 1964.

TEDDY W. AIRHART, JR.

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